Supreme Court, U.S.
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NO. 92 - 206

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1991

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Respondent.

v.

BRADLEY ALAN PURDY, D.L. and J.L.,
and D.L. as Guardian ad Litem
of C.L. and A.L., Minors,

Petitioners.

Petition for Writ of Certiorari to
the Supreme Court of South Dakota

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution are violated by a state supreme court decision applying an objective standard under state law to the question of whether a sexual molester expects or intends injury to his minor victims within the meaning of an exclusion in the molester's liability insurance policy.

2. Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is violated by a state supreme court decision applying an objective standard under state law to the question of whether a sexual molester expects or intends injury to his minor victims within the meaning of an exclusion in

the molester's liability insurance policy.

3. Whether the prohibition against impairment of contracts under Article 1, § 10, Cl. 1 of the United States Constitution is violated by a state supreme court decision adopting a rule of construction of a liability insurance contract.

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JURISDICTIONAL STATEMENT

Respondent accepts the jurisdictional statement of Petitioners.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Respondent agrees that Petitioners have accurately quoted and appropriately emphasized the constitutional provisions Petitioners rely upon.

STATEMENT OF THE CASE

Except as described below, Respondent accedes to Petitioners' Statement of the Case, including the Material Facts and Procedural History presented by the Petitioners. Petitioners do not present a federal question substantial enough to warrant this Court's review on Writ of Certiorari. The challenged decision of the South Dakota Supreme Court involved the interpretation of an exclusion in a liability insurance contract. The

United States Constitution should not be invoked to deprive state supreme courts of the right and duty to interpret disputed contracts between private parties.

The liability policy issued by American Family to the sexual molester ("Purdy") provided that coverage did not apply to injury "which is expected or intended by any insured. . . ." PET. APP. 67. The sexual molestation consisted of fondling of minor boys' genitals.[1] The victims received no physical injuries. Damages awarded in a separate suit were for mental and emotional injuries. This is not a case where a victim sustained an accidental physical injury in the course of the

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[1] Petitioners' Complaint against Purdy alleged that he "negligently and without intent to harm" fondled the young boys. RESP. APP. 67. This unusual allegation is more understandable as a means to manufacture insurance coverage than as common sense.

sexual contact (i.e. by falling down, attempting to escape, etc.).

In the trial of the declaratory judgment action Petitioners' expert testified that, in a subjective sense, Purdy did not expect or intend the harm for which damages were awarded against him. The expert had never interviewed or even met Purdy or his victims.[2] As is evident from its opinion, the South Dakota Supreme Court was persuaded by overwhelming contrary evidence from the deposition of Purdy, who was not present at the trial:

> Each of the four described incidents ended with Purdy asking A.L. if it felt good, to which A.L. responded "No."
>
> ....

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[2] The expert also conceded that his testimony was unprecedented in his own experience and had no support in professional or scientific literature. For more detail on the incredible nature of his testimony, see RESP. APP. 32-35.

He [Purdy, the perpetrator] stated that his prior victimization caused him considerable mental pain over the years including guilt, fear, shame and embarrassment. He could never bring himself to discuss this with his parents, despite what he considered a good relationship.

When initiating sexual contacts with the children, Purdy thought about his own experiences. Following each contact with the children, he told himself he wouldn't and shouldn't do it again. Purdy stated that he knew no good would result from these contacts with the children - even for himself or for them. In addition, as indicated above, Purdy closed and blocked the door and then held and sexually abused the children. He also bribed or threatened them not to tell their parents and, at the conclusion of one incident, inquired whether C.L. was okay.

. . . .

Therefore despite the testimony of Purdy and the Affidavit of Dr. McCall-Perez, it is clear that Purdy was aware of the harmful effects of such conduct.

American Family Insurance Co. v. Purdy, 483 N.W.2d 197, 200-201 (S.D. 1992); PET. APP. 91, 105-106 (emphasis supplied).

The South Dakota Supreme Court reversed the trial court's denial of American Family's Motion for Summary Judgment and, in interpreting the insurance policy, inferred "as a matter of law that harm was expected or intended" 483 N.W.2d at 201. The trial of the declaratory action was to the Court without a jury. Id. at 198. Because the South Dakota Supreme Court ruled that summary judgment should have been granted, the Court never reached the question of whether the trial court's findings and conclusions as a result of the trial were clearly erroneous and thus reversible.

SUMMARY OF ARGUMENT

Petitioners lack standing. To demonstrate standing, they must prove that it is likely, rather than speculative, that their injury will be cured by a favorable decision of this Court. The South Dakota Supreme Court held that the trial court erred in denying Respondent's Motion for Summary Judgment. However, the opinion also implies that on remand by this Court, the South Dakota Supreme Court would hold that the Purdy deposition testimony establishes beyond any reasonable dispute that Purdy expected harm to his victims and thus the trial court was clearly erroneous in finding for Petitioners. This result could be and would be reached without the need to establish any "irrebuttable presumption," and would render this Court's opinion merely advisory.

A Petition for Writ of Certiorari should not be granted unless it unambiguously appears that the state court decision to be reviewed lacks an adequate and independent ground in state law. The fact that the South Dakota Supreme Court specifically held that Purdy was aware of the harmful effects of his conduct does suggest the existence of an adequate and independent ground under state law. Certainly the South Dakota Supreme Court could review evidence and apply state law to it without offending the United States Constitution.

Because this case involves disputed claims under a liability insurance policy, and not fundamental interests, the South Dakota Supreme Court is free to adopt a prophylactic measure so long its inference of one fact from proof of another is not unreasonable and

arbitrary. Because there has been understandable state court skepticism about psychological evidence of the actual subjective intent of sexual molesters and because of the overwhelming evidence to the contrary described in the South Dakota Court's opinion, there is certainly a rational basis for the court's inferring as a matter of law a result that could be validly achieved by other means, such as legislative enactment or explicit policy exclusion.

For these same reasons, the South Dakota Supreme Court opinion also satisfies the more rigorous standard set forth in Vlandis v. Kline, 412 U.S. 441 (1973). There is substantial evidence by Purdy's own deposition testimony that he was "aware of the harmful effects of such conduct." 483 N.W.2d at 201, PET APP 106. Therefore, there was a more

than sufficient basis in fact to support the "irrebuttable presumption." The insurance contract interpretation rule under South Dakota law is an objective standard. Determination of actual subjective intent on a case-by-case basis is not a reasonable alternative to establishing an irrebuttable presumption that is grounded in an objective standard.

Petitioners' equal protection argument is based upon a comparison of two decisions of the South Dakota Supreme Court: The decision below which allegedly established an irrebuttable presumption of expectation that sexual molesters expect direct emotional harm to their victims; and another case in which the same court held that an assailant may not have intended or expected the broken ankle to result from a fist fight. The two cases are so

factually distinguishable that there is a rational basis for the South Dakota Supreme Court to afford differing treatment to the two cases.

Finally, Petitioners cannot challenge the South Dakota Supreme Court decision as an unconstitutional impairment of contract, because that clause of the Constitution applies only to legislative enactments and not judicial decisions.

ARGUMENTS OPPOSING ISSUANCE OF A WRIT OF CERTIORARI

I. Petitioners Lack Standing to Bring this Constitutional Challenge to the Decision of the South Dakota Supreme Court Because Petitioners Cannot Show that it is Likely that the "Injury" of this Court Will be Redressed by a Favorable Decision.

The concept of standing derives from the case-or-controversy requirement of Article III of the United States Constitution. Lujan v. Defenders of Wildlife, 504 U.S. _____, 112 S.Ct.

_____, 119 L.Ed.2d 351 (1992). Last term the Court in Lujan reiterated the three required elements of standing:

> First, the Plaintiff must have suffered an "injury in fact" . . . . Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision"

504 U.S. at _____, 112 S.Ct. at ____, 119 L.Ed.2d at 364 (emphasis supplied). Here, Petitioners cannot satisfy the third required element.

A decision of this Court holding unconstitutional the "exception for criminal sexual contact cases as an impermissible 'irrebuttable presumption'" would not end the case. Presumably, there would be no offense to the United States Constitution if the South Dakota Supreme Court decided that in this case and as to Purdy only, the

trial court's findings were clearly erroneous. This argument was made by American Family on appeal (RESP. APP. 17-25, 29-44). The South Dakota Court never reached this issue because it disposed of the case by holding that the trial court erred in denying American Family's Motion for Summary Judgment.

If this Court were to grant the Petition and later rule for Petitioners, Respondent presumes that the case would then be remanded to the South Dakota Supreme Court for proceedings not inconsistent with this Court's opinion. Since the South Dakota Supreme Court did not reach the question of whether the trial court's trial findings were clearly erroneous, and since Respondent raised this issue on appeal to the South Dakota Supreme Court, Respondent would be free to request a rehearing on that issue and the South Dakota Supreme Court

would be free to decide against Petitioner accordingly. Cf. State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976).

There are substantial reasons to believe that such a result is likely, or conversely, that Petitioners cannot show that it is likely a favorable decision of this Court would avoid such a result.

Under South Dakota law, whether an insured expects injury (perhaps as opposed to intending it) is determined by an objective standard. Western Casualty & Surety Co. v. Waisanen, 653 F.Supp. 825 (D.S.D. 1987).[3] In that case an insured city was habitually late in paying its health insurance premiums. When the health insurer canceled for

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[3] Waisanen was cited with apparent approval by the South Dakota Supreme Court in Tri-State Insurance Co of Minnesota v. Bollinger, 476 N.W.2d 697, 701 (S.D. 1991).

nonpayment, a city employee was harmed because of medical and hospital bills that were not covered. As to a subsequent suit by the employee against the city, the liability insurer for the city denied coverage on the ground that the harm to the employee was "expected by the City." The Court phrased the coverage issue as follows:

> The question remaining for consideration is whether the cancellation of its health policies with Rural [the health insurer] was "expected" by the City.

Id. at 830. The Court then adopted the "substantial probability" test, i.e. injury or damages were expected if "the actor knew or should have known that there was a substantial probability that certain consequences would result from his actions." Id. at 831 (emphasis supplied). That same standard was

adopted by the Eighth Circuit Court of Appeals (under Minnesota law) in Auto-Owners Insurance Co. v. Jensen, 667 F.2d 714 (8th Cir. 1981):

> There may be instances when, although the insured was negligent in his actions, he knew or should have known that the resulting damage was expected. To mandate damages cannot be expected if the actor is negligent results in a meaning of the term expected that is too narrow.

Id. at 719 (emphasis supplied).

There is substantial reason to believe that, on remand, the South Dakota Supreme Court would hold (even in the absence of any presumption) that Purdy knew or should have known that there was a substantial probability that the victims would suffer direct harm by

his molestation.[4] In its published opinion, the South Dakota Supreme Court acknowledged American Family's argument that "if injury was not intended in the strict sense, at the very least, injury, adverse consequences, emotional stress or other harm is certainly expected by a child molester." 483 N.W.2d 200. The Supreme Court then discussed very substantial evidence from Purdy's own deposition testimony indicating that he should have known of the substantial probability of harm and certainly did

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[4] Under South Dakota law, even though the state Supreme Court perceives factual disputes preventing summary judgment, the Court can still reverse a trial court after a full trial, particularly where, as in this case, the trial court received the crucial testimony by deposition instead of from a live witness. See e.g., Groseth International, Inc. v. Tenneco, Inc., 410 N.W.2d 159, 172 (S.D. 1987), appeal after remand 440 N.W.2d 276, 279 (S.D. 1989). In this case the South Dakota Supreme Court reversed summary judgment on a defamation claim, perceiving disputed fact issues preventing summary judgment, but after a jury trial, held that based on the evidence actually offered at trial, the defamation issue should not have been submitted to the jury.

know. Id. at 200-201. In fact, the South Dakota Court specifically found that despite the expert testimony, "it is clear that Purdy was aware of the harmful effects of such conduct." Id. at 201.

The South Dakota Court then went on to observe that (i) deference on appeal to the trial court's findings need not be accorded because Purdy's testimony was by deposition, and (ii) in South Dakota a party cannot make out a better case than his own testimony permits. Id. at 201.[5]

In the past, the South Dakota Supreme Court has demonstrated a willingness to rely on grounds independent of the United States

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[5] Thus, if the "irrebuttable presumption" is overbroad or simply not true sometimes, Purdy stands in no position to complain. The presumption is completely accurate when applied to Purdy, as the South Dakota Court explicitly held.

Constitution to affirm its decision after this Court has reversed its decision on Federal Constitutional grounds. State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

Under Lujan v. Defenders of Wildlife, supra, the Petitioner has no standing if he cannot prove it is "likely" as opposed to "speculative" that a decision of this Court will end the case with a result opposite of the summary judgment for Respondent. Since Petitioners have not met and cannot meet that burden, the Petition for Writ of Certiorari should be denied.

II. The Petition Should be Denied Because There Exists an Adequate and Independent Ground Under State Law for the Challenged Decision.

This Court should not review a judgment of a state court unless it affirmatively appears of record that the state court decision does not rest on an

adequate and independent ground in state law. South Dakota v. Neville, 459 U.S. 553, 560 (1983) (per Stevens, J. dissenting); Herb v. Pitcairn, 325 U.S. 117 (1945). In the past this Court has vacated a state court judgment and remanded for clarification of the basis of a decision in instances where there was an ambiguity as to the existence of independent adequate state law grounds. South Dakota v. Neville, 459 U.S. at 571 n.8 (Stevens, J., dissenting).

The South Dakota Supreme Court opinion disclosed two potentially adequate grounds under state law to support its decision:

> 1. The testimony of Petitioners' expert that Purdy did not expect harm to the minor victims from his sexual molestation "flies in the face of all reason, common sense,

and experience." American Family Insurance Co. v. Purdy, 483 N.W.2d 197, 199 (S.D. 1992) [Quoting with apparent approval CNA Insurance Co. v. McGinnis, 666 N.W.2d 689, 691 (Ark. 1984)].

2. The actual subjective intent claimed by Petitioners through their expert is directly contradicted by Purdy's own deposition testimony, which contradiction was reviewable without any deference to the state trial court. 483 N.W.2d at 201.

In other words, the South Dakota Supreme Court opinion could be read simply as the Court's judgment that the actual preponderance of evidence itself (rather than any irrebuttable presumption) required that Petitioners' claims of the

lack of subjective intent be rejected as a matter of law. This argument was raised, briefed and argued by Respondent. The South Dakota court specifically stated:

> Therefore, despite the testimony of Purdy and the Affidavit of Dr. McCall-Perez, it is clear that Purdy was aware of the harmful effects of such conduct.

483 N.W.2d at 201. PET. APP. 106. Even if the opinion is not crystal clear on this subject, it is clear, however, that the South Dakota Court found it necessary and appropriate to describe in detail the facts at trial contrary to Petitioners' arguments and to remind the parties that those facts were reviewable by the South Dakota Supreme Court without any required deference to the trial court. 483 N.W.2d at 200-201.

Review by this Court is purely discretionary. That discretion should

not be exercised when acceptance of review will likely bring only a remand to the South Dakota Supreme Court for clarification of the basis of its decision.

III. The Decision of the South Dakota Supreme Court Inferring as a Matter of Law that Harm was Expected or Intended by Perpetrators of Criminal Sexual Contact does not Create an Impermissible Irrebuttable Presumption.

A. The South Dakota Supreme Court merely adopted a constitutionally - permitted prophylactic measure for which a rational basis existed.

The end result of the South Dakota Supreme Court decision is the application to sexual contact cases of essentially the same objective standard for the "expected" policy exclusion as the District Court did in Western Casualty & Surety Co. v. Waisanen, supra. In other words, the South Dakota Court merely applied to a specific class of cases an objective standard that was

already one of general applicability in insurance coverage cases in South Dakota. The United States Constitution is not violated by use of this objective standard to judge whether an insured "expects" an injury to result from his conduct.

Petitioners omit reference to decisions of this Court which dictate the proper analysis. They are Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973); Weinberger v. Salfi, 422 U.S. 749 (1975); and Usery v. Turner Elk Horn Mining Co., 428 U.S. 1 (1976). Together, those cases stand for two propositions very important to this case:

1. The constitutional prohibition against irrebuttable presumptions does not prevent a state from adopting prophylactic

measures, i.e. applying a rule or legislation to a defined class of circumstances or persons. Mourning v. Family Publications Service, Inc., 411 U.S. at 377.

2. Whatever rigors inhere in the irrebuttable presumption analysis applicable to such fundamental liberties as residency, custody of children, marriage and family life do not apply where the stakes are economic only. Weinberger v. Salfi, 422 U.S. at 771-73; Usery v. Turner Elkhorn Mining Co., 428 U.S. at 23-24, 28. On economic issues, the standard is simply whether there is "some rational connection between the fact proved and

> the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." Id. at 28 [quoting Mobile, J. & K. C.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910)].

The result achieved by the South Dakota Supreme Court decision could also be legitimately accomplished in many other ways:

1. The liability insurer could change the language of its policy to specifically adopt a substantial probability test for the "expected or intended" exclusion.

2. The liability insurer could change its policy to explicitly exclude harm by intentional sexual contact.

3. The South Dakota Legislature could decide on public policy grounds that sexual offenders should not have the benefit of insurance coverage for their criminal wrongs.

4. The South Dakota Supreme Court could decide that it was against the public policy of South Dakota to afford liability insurance coverage for the criminal wrongs of sexual offenders, as the Court has with certain claims for civil penalties. Ft. Pierre v. United Fire and Casualty, 463 N.W.2d 845, 848-49 (S.D. 1990).

Each of these actions would be a prophylactic measure that would not offend the United States Constitution. Furthermore, inferring an expectation of emotional harm from unwanted physical sexual contact with minors certainly satisfies the Turner Elkhorn standard of "rational connection." It is important

to note here that the applicable standard is "rational," not "perfect."

B. The South Dakota Supreme Court decision satisfies even the more rigorous standard required by Vlandis v. Kline.

i. Expectation by sexual offenders that their victims would suffer emotional harm from direct unwanted sexual contact has a sufficient basis in fact to support an irrebuttable presumption.

Some courts have considered claimed scientific evidence that sexual offenders do not actually intend or expect, in a subjective sense, harm to their victims. These courts have found repeatedly that such evidence is inherently incredible and flies in the face of common sense. See e.g., Landis v. Allstate Insurance Co., 546 S.2d 1051, 1053 (Fla. 1989); J.C. Penney Casualty Insurance Co. v. M.K., 804 P.2d 689 (Cal. 1991); CNA Insurance Co. v. McGinnis, 666 S.W.2d 689, 691 (Ark.

1984).

The South Dakota Supreme Court cited undisputed evidence from the record directly contrary to the so-called scientific evidence of Petitioners. The South Dakota Court explicitly found, despite the expert testimony, that Purdy was aware of the harmful effects of his conduct. In effect, Petitioners ask this Court to substitute its judgment, both as to empiricism and common sense, for the judgment of state courts and find that Petitioners' subjective intent evidence is sometimes true.

The issue is further complicated when one considers that there is an objective element to the "expected" test in South Dakota. Western Casualty & Surety Co. v. Waisanen, supra. The views of our South Dakota Supreme Court as to how the objective standard is

applied have not clearly crystallized. Compare Klatt v. Continental Insurance Co., 409 N.W.2d 366 (S.D. 1987); Tri-State Insurance Co. of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991); and American Family Mutual Insurance Company v. Purdy, 483 N.W.2d 197 (S.D. 1992). To accept Petitioners' arguments on the irrebuttable presumption, this Court must presume that the generally applicable standard in South Dakota is a purely subjective one, requiring this Court to define a state law rule that has not yet been clearly enunciated by the court having right to the "last word" on that standard.

ii. There are no reasonable alternative means available to make the required determination allegedly eliminated by the irrebuttable presumption.

Petitioners' argument on this issue begs the question. Petitioners assume

that the legal inference of expectation or intent is merely a convenient substitute for a case-by-case determination of actual subjective intent. Time and again, state courts have rejected expert evidence of subjective intent because such evidence is so incredible and overwhelmingly contrary to common sense. Ante at 27. It is even more illogical to argue that consideration of such rejected evidence on a case-by-case basis is a reasonable alternative to rejecting it. In other words, acceptance of what has been rejected is not a reasonable alternative to its rejection.

If the standard were otherwise, state and federal trial courts would be unduly limited in their ability to apply evidentiary rules to exclude evidence which as a genre fails to meet minimum standards of scientific reliability or

other rationale for admissibility. For instance, can state or federal courts legitimately exclude evidence of polygraph results, or instead does the Due Process Clause require that each individual result be submitted to a jury? Is it constitutionally permissible to exclude evidence of all subsequent remedial measures used to prove culpable conduct under § 407 of the Federal Rules of Evidence, or must a court analyze each situation to determine whether the rationale for the rule actually applies to those facts? Under Rule 606 of the Federal Rules of Evidence, a juror may not testify concerning the process by which a verdict was reached except as to the existence of "extraneous prejudicial information." The Advisory Committee rationale is that:

> The mental operations and emotional reactions of jurors arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment.

In a case where jury affidavits are particularly compelling, does the United States Constitution require that a judge disregard the rule because in a given instance there happens to be a "reasonable" alternative to a blanket exclusion?

These examples serve to further emphasize the essential flaw in Petitioners' argument on this issue. While it is possible to have a court or jury trial on the actual subjective intent of each insured sexual molester, this is not a reasonable alternative where actual subjective intent has been permissibly rejected in favor of a standard that includes an element of

objectivity. As this Court recently reaffirmed:

> It is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration.

Michael H. v. Gerald D., 491 U.S. 110, 126 (1989).

Finally, where Purdy's own testimony so strongly establishes that he expected harm to his victims, and no reasonable minds could differ about the "expected" issue, it would not be a reasonable alternative to permit persons who are strangers to the contract between Purdy and American Family to show that his actual subjective intent was something different.

V. The "Irrebuttable Presumption" does not Violate the Equal Protection Clause of the Fourteenth Amendment.

Petitioners' argument centers on a comparison of two South Dakota Supreme

Court decisions: American Family Mutual Insurance Company v. Purdy, 483 N.W.2d 197 (S.D. 1992) and Tri-State Insurance Co. of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991). Petitioners point to the fact that in Purdy, the South Dakota Supreme Court adopted an "expected or intended" rule as a matter of law, while in Bollinger, the same court permitted that issue to be decided by a jury. Bollinger involved a criminal assault rather than unwanted sexual contact.

This Court's interpretation of the Equal Protection Clause has for many years involved a two-tiered analysis, dependent on the nature of the right or interest to be protected. Burlington Northern Railroad Co. v. Ford, 504 U.S. ____, 112 S. Ct. ____, 119 L.Ed.2d 432 (1992). Where merely economic interests (as opposed to fundamental rights) are

involved, distinctions between classes of affected parties do not deny equal protection "unless they failed in rationally furthering legitimate state ends." Id. at ____, 119 L.Ed.2d at 438. "Rational distinctions may be made with less than mathematical precision." Id. at ___, 119 L.Ed.2d at 439 [quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976).]

Because Bollinger and Purdy, both supra, do not involve fundamental rights and do involve differing facts, the South Dakota Supreme Court's differing treatment of them comports with the Equal Protection Cause. In Bollinger, the victim suffered a broken ankle as an indirect result of a fist fight. 476 N.W.2d at 700. The South Dakota Supreme Court determined that, while it might be said that the perpetrator could have expected facial cuts, he might not have

reasonably foreseen a broken ankle. 476 N.W.2d at 700.

If in Purdy, one of the victims had fallen during or as the result of sexual contact and had broken an ankle or other part of his body, Purdy would then more closely resemble Bollinger. No such injury was present in Purdy, however. If it were, the two cases would be more alike and there is nothing in the record to suggest that the South Dakota Supreme Court would have then treated Purdy differently than Bollinger.

In other words there is nothing to suggest that the "irrebuttable presumption" rule adopted by the South Dakota Supreme Court in Purdy, would apply to indirect physical harm (such as a broken limb) as opposed to the more direct emotional and psychological injury (the expected results of sexual contacts with children) for which a

money judgment was recovered against Purdy. Accordingly, Petitioners cannot sustain their equal protection argument.

VI. The "irrebuttable presumption" of Purdy does not violate the prohibition against impairment of contracts.

Petitioners' argument is clearly without any merit. Article I, § 10, Cl. 1 of the United States Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." (emphasis supplied.) This clause is directed only to legislative action and does not apply to judicial decisions. Barrows v. Jackson, 346 U.S. 249, 260 (1953).

CONCLUSION

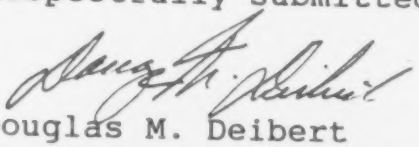
Petitioners search in vain for a federal constitutional provision requiring South Dakota courts to accept evidence which has been repeatedly characterized as inherently incredible

and defying common sense. Beyond that, this Court is asked to review a case that will require the Court to speculate about the actual intent of a state court in rendering its decision and to interpret state law rules of decision that are not yet clearly focused and established, all to the probable end that this Court's opinion will become advisory only or will require the Court to remand to the South Dakota Supreme Court for further clarification of the record.

Aside from the Petition's clear lack of constitutional merit, the extra burdens and ambiguities presented by this case suggest that it should not be among those relative few, from among thousands, that the Court accepts for decision. Accordingly, the Petition for

Writ of Certiorari should be in all respects denied.

Respectfully submitted.



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